

Order

Michigan Supreme Court
Lansing, Michigan

November 4, 2022

Bridget M. McCormack,
Chief Justice

164807

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

FREDERICK NIENSTEDT,
Plaintiff,

v

SC: 164807

SECRETARY OF STATE,
Defendant.

On order of the Court, the complaint for superintending control is considered, and relief is DENIED, because the Court is not persuaded that it should grant the requested relief.

VIVIANO, J. (*concurring*).

Plaintiff filed this case to obtain an order requiring that the full language of all proposed constitutional amendments be sent to absentee voters along with their absentee ballots. I agree with this Court's denial order because there is currently no legal requirement that voters receive a copy of the full text of proposed constitutional amendments. I write, however, because I believe there should be.

The language of the law matters. Any rule that obscures the law's text from the people to whom it applies would be fundamentally unjust. See Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175, 1179 (1989) ("It is said that one of emperor Nero's nasty practices was to post his edicts high on the columns so that they would be harder to read and easier to transgress. As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean."). The same is true even when the text is available but incomprehensible to an ordinary reader or nearly so. After the Norman conquest of England, "law French" became the language used in judicial proceedings. Mellinkoff, *The Language of the Law* (Boston: Little, Brown and Company, 1963), pp 95-96. But commoners could not speak this language, and law became inaccessible to average subjects of the realm. *Id.* at 101. When Parliament remedied this situation in 1362 in the Statute of Pleading, making English the language of the law, it expressed the purpose that "every Man of the said Realm may the better govern himself without offending of the Law, and the better keep, save, and defend his Heritage and

Possessions” Statute of Pleading, 36 Edw III c 15 (1362); but see *The Language of the Law*, pp 112-113 (noting the persistent use of Law French after the Statute of Pleading).

The importance of clear and comprehensible language in our laws has not diminished over the centuries. If anything, the rapid proliferation of statutory and regulatory laws makes the comprehensibility and accessibility of legal texts more critical than ever. A significant portion of the modern appellate judge’s job is to parse the language of constitutions, statutes, regulations, and other rules and sources of law. As in most modes of communication, it is generally a safe assumption that the language in such texts was chosen deliberately. Cf. *Pohutski v City of Allen Park*, 465 Mich 675, 683-684 (2002) (“ ‘The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another.’ ”) (citation omitted). Indeed, in the constitutional sphere, our fundamental interpretive principle is that the text means what it was commonly understood by the ratifiers to mean—a principle that would hardly be possible if the ratifiers had no opportunity to read and understand the text they were enacting into law. *Citizens Protecting Michigan’s Constitution v Secretary of State*, 503 Mich 42, 61 (2018).

Yet when it comes time for Michiganders to vote on constitutional amendments, our laws provide voters with no real opportunity to read and understand the proposed amendments. In Michigan, the full text of constitutional amendments is not sent to voters and does not appear on the ballot itself.¹ In fact, the only individuals presented with the “full text” of the amendment are those who are asked, at a much earlier stage of the process, to sign the petition to place the amendment on the ballot. Const 1963, art 12, § 2; MCL 168.482(3).² But when this Court recently considered the petition requirement, a majority concluded that the pervasive lack of spacing between words in the amendment at issue was no obstacle to its placement on the ballot. *Reproductive Freedom for All v Bd of State Canvassers*, ___ Mich ___, 978 NW2d 854 (2022). As my dissent in that case explained,

¹ Instead, only a 100-word summary “of the purpose of the proposed amendment” appears on the ballot. Const 1963, art 12, § 2. Copies of the text of constitutional amendments must be posted “in conspicuous places in the room where the election is held.” MCL 168.480. But this, of course, does not aid absentee voters and even for poll voters does not, in my view, provide an adequate opportunity to read and consider proposed amendments that can be thousands of words long. Finally, while the Secretary of State must post the petition language online, MCL 168.483a(3), no notice of either the physical or online postings is provided to voters.

² As I noted previously, this usually occurs in conditions uncondusive to meaningful reflection upon the proposed law. See *Reproductive Freedom for All v Bd of State Canvassers*, ___ Mich ___, ___, 978 NW2d 854, 870 (2022) (VIVIANO, J., dissenting).

spacing between words is a critical and longstanding practice that “facilitates reading and comprehension” *Id.* at ____; 978 NW2d at 869 (VIVIANO, J., dissenting). When reading and comprehension are thus impeded, the lone official chance of even this smaller subset of voters to review the full text of the law is made hollow.

If this Court is not going to take seriously the only official presentation of the amendments to the relatively small number of petition signers, then perhaps it is time for the Legislature to take up this issue and devise a means to formally provide the actual proposed text to voters. Other states have found ways to do so. California, for example, requires the Secretary of State to send to voters, at least 40 days before an election, a guide containing information about the proposed laws to be passed upon at the election. Cal Elections Code 9094(a). In addition to containing discussion of each ballot measure, the guide must contain a link “identifying the location on the Secretary of State’s internet website of the complete text of the state measure,” and it must advise the voter that a printed copy is available upon request. Cal Elections Code 9086(f). Arizona similarly requires its Secretary of State to prepare a pamphlet that contains “[a] true copy of the title and text of the measure or proposed amendment” being put before the voters by initiative or referendum. Ariz Rev Stat Ann 19-123(A)(1). A copy of the pamphlet is available online and must be mailed to every household with a registered voter (or can be e-mailed, instead, upon request). Ariz Rev Stat Ann 19-123(C). Measures such as these ensure that voters can take time to study the actual text of the proposed law that they will be asked to vote upon in the election.

There are no comparable provisions in our law. Instead, as noted, the single time our law provides for at least some voters to be formally presented with the proposed text is when they sign a petition to put it on the ballot. Voters who take direct part in the democratic process deserve more than this. The products of our direct-democracy process should reflect the reasoned deliberation of the people. For the process to properly function, voters need a full and fair chance to read and consider the words that may govern them and the state. I strongly encourage the Legislature to consider adopting a requirement that voters be provided with the full text of any proposed constitutional amendments or laws that they will be asked to vote upon.



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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 4, 2022

Clerk